United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

Court of Appeals of the District of Columbia

364

APRIL TERM, 1905.

No. 1559.

No. 23, Special Calender.

The United States on Relation of Margarito Romero, Mayor, Jesus M. Tafoya, Recorder, and Ignacio Esquibel *et al, Appellants,*

vs.

George B. Cortelyou, *Postmaster General.*

BRIEF FOR APPELLANTS.

S. A. PUTMAN,
of Counsel.

WM. H. ROBESON,
Attorney.

IN THE

Court of Appeals of the District of Columbia.

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No. ~~23~~, SPECIAL CALENDAR.

THE UNITED STATES ON RELATION OF MARGARITO ROMERO, MAYOR, JESUS M. TAFOYA, RECORDER, AND IGNACIO ESQUIBEL *et al*, *Appellants*,

vs.

GEORGE B. CORTELYOU, *Postmaster General.*

Brief for Appellants.

This is an action brought by the Mayor, Recorder, and Trustees of the Town of Las Vegas, New Mexico, together with two citizens of that town, seeking the issuance of a writ of *mandamus* requiring the Postmaster General to re-establish in said town the post office which had been theretofore abolished by the order of that official.

The suit was originally brought against Henry C. Payne, who was then Postmaster General. Upon the death of Mr. Payne the suit was revived under statu-

tory authority against his successor, Robert J. Wynne. Mr. Wynne was succeeded by the present Postmaster General, George B. Cortelyou, against whom, under the same authority the suit was revived, and he is at the time of the writing of this brief the defendant.

The Town of Las Vegas, New Mexico, is the county seat of San Miguel County. The City of Las Vegas, New Mexico, is located in the same county, the two communities being separated by a small stream, the Gallinas River.

At the time of the abolishment or discontinuance of the post office in the Town of Las Vegas and its consolidation with the post office in the City of Las Vegas, the Town of Las Vegas was not a body politic and corporate, and was known simply as "Las Vegas," while the present City of Las Vegas was known as "East Las Vegas." However, since the consolidation of the two post offices Las Vegas has been incorporated as the "Town of Las Vegas." The present bodies politic and corporate, namely the "Town of Las Vegas" and the "City of Las Vegas," comprise exactly the same territory included within their boundaries when they were known respectively as "Las Vegas" and "East Las Vegas."

The Act of June 9, 1896 (29 Stat. L., 313), is, as far as it is necessary for us to consider it, in these words:

> Provided, That no post office established at any county seat shall be abolished or discontinued by reason of any consolidation of post offices made by the Postmaster General under existing law, and any such post office at a county seat heretofore consoli-

> dated shall be established as a separate post office at such county seat. Provided, however, that this provision shall not apply to the City of Cambridge, Massachusetts, or to Towson, Maryland; and provided further, that hereafter no station, sub-station, or branch post office shall be established beyond the corporate limits or boundaries of any city or town in which the principal office to which such station, sub-station, or branch office is attached is located, except in cases of villages, towns, cities of 1,500 or more inhabitants, not distant more than five miles as near as may be from the outer boundary or limits of such city or town in which the principal office is located.

The post office in the said Town of Las Vegas was a Presidential office. On March 31, 1903, this office was abolished by order of Postmaster General Payne "and discontinued and consolidated with the post office in the Town of East Las Vegas, now called the City of Las Vegas," and since its abolishment no post office has been maintained in the said Town of Las Vegas.

This action is brought by the Mayor, Recorder, and Trustees of the Town of Las Vegas, being its governing body, with whom are joined two citizens of lawful age. On the trial in the court below some contention was made by the defendant as to the right of this governing body and these citizens to maintain the action. The opinion of his Honor Judge Barnard is very emphatic in declaring that in so far as the parties are concerned the action was properly brought. We shall discuss the question after completing the statement of the case.

No objection has been made to the formal statements of the petition, as for instance regarding allegations of the interest of the parties, the character of the duty devolved upon the Postmaster General, that there is no adequate remedy at law, that the relators have a clear, legal right to the issuance of the writ, and other like allegations essential to be made in such an action.

The return of the Postmaster General is somewhat in the nature of a plea of confession and avoidance, and the cause came up for hearing in the court below upon the motion of the relators for the issuance of a peremptory writ, it being endorsed upon said motion—

> "In support of this motion it will be argued that the defendant has by his return admitted all material allegations of fact set out in the petition."

There can be no question that such is the necessary effect of the return of the Postmaster General. For instance, the return states that he neither admits nor denies that the relators are the officials or the citizens they claim to be; that as to the allegation that the Town of Las Vegas is the county seat of San Miguel County he has no knowledge, but is informed that both the Town of Las Vegas and the City of Las Vegas claim to be such county seat and the defendant demands proof on that point. The return denies that the failure to re-establish the post office is in violation of the law; it states that the Postmaster General has no knowledge of the incorporation of the Town of Las Vegas. It denies that the inhabitants of the town are entitled under the

law to have a post office established and maintained there, and it denies that the inhabitants will be put to great inconvenience. The return then proceeds to admit the discontinuance of the post office and to allege that the Postmaster General has offered to establish a branch post office in the town, or to give them free delivery.

The trial judge held, in accordance with most thoroughly established legal principles, that the failure to deny these allegations was, for the purposes of the motion, an admission of the facts. Of course, the denial that by the abolishment or discontinuance of this post office by reason of its consolidation with the post office in the City of Las Vegas was not a violation of law, being itself a legal question, can not be considered as affecting the facts which are necessary or material to be considered. So that we repeat, the return is a confession that he has done what the law forbade him to do, the effect of which he seeks to avoid with the statement that he has offered to the inhabitants of the Town of Las Vegas "something equally as good" if not better. We have, therefore, to consider whether the return of the Postmaster General is not, as stated on the motion for a peremptory writ, an admission of "all material allegations of fact set out in the petition," and this question will be discussed in order.

Finally it was contended in the court below that the statute hereinbefore cited required the re-establishment of only those post offices which had been abolished before that statute was enacted, and that it could have no application to post offices abolished after the statute

was enacted, though the act of abolishment was in violation of the law; and further that the writ of *mandamus* was not the proper remedy to invoke for the re-establishment of this post office, because the abolishment thereof has been effectuated and the matter is a closed incident. We shall, therefore, have to consider whether the writ of *mandamus*, is the proper remedy to invoke.

There are some other matters for consideration which will be discussed in order, the chief of these being that when the entire act is read it will be very clear that it was the purpose of Congress in the enactment of this statute that there should be in every county seat in the United States a post office, and that while the words of the law apply to post offices theretofore abolished, the premptory command of that law, that none should be thereafter abolished, placed upon the Postmaster General the continuing duty of maintaining a post office in every county seat. If this is so, then certainly the proper remedy is invoked.

Have the Relators such Interest as Entitles Them to Maintain the Action?

At first blush it would seem that if the officers of an incorporated town and its citizens can not maintain such an action, then such an action can not be maintained. What other persons or body can have a deeper interest or a better right to seek the re-establishment of the post office than citizens of the town and its officials? We should maintain, if necessary, that any citizen of

the town has the right to maintain the action. On this point the court below says:

> "It may be true that the Town of Las Vegas is a municipal corporation and could not properly take the initiative in a proceeding of this kind, but the citizens of the town who receive and send mail from it and who are interested in the wellfare of the place, who have property rights there and pay taxes, it seems to me would have the right to call the court's attention to the violation of a law which in any way affected the public right; for in a *mandamus* proceeding to enforce a public right it is the people who are regarded as the real party, and any one or more of them may petition for relief." (Record page 13.)

The Justice cites the case of State *vs.* Weld, 39 Minn., 426; State *vs.* Shropshire, 4 Nebr., 411; and refers to a number of cases in which it is held that any citizen may become the relator in a proceeding to secure the execution of a public statute without showing a special interest therein; and he cites from High's Extraordinary Legal Remedies, Section 431, the following:

> When the question is one of public right and the object of the *mandamus* is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator, at whose instigation the proceedings are instituted, need not show that he has any special interest in the result, it being sufficient to show that he is a citizen and as such interested in the execution of the law.

This last citation is an admirable statement of the concensus of the opinions on that subject. Indeed it is

so evident that the governing body and its citizens are the proper parties to maintain such an action that counsel cites with some reluctance a number of cases in which the principle is stoutly declared.

Fla. Central & P. R. R. Co. *vs.* State, 31 Fla., 422; 13 Southern Rep., 103.

Moses *vs.* Kearney, 31 Ark., 261.

State *vs.* Gracey, 11 Nev., 223.

Hyatt *vs.* Allen, 54 Calif., 353.

Pike Co. Commissioners *vs.* People, 11 Ill. (1 Peck) 202.

City of Ottawa *vs.* People, 48 Ill., 233.

Decatur Co. Commissioners *vs.* State, 86 Ind., 8.

State *vs.* Judge of Marshall Co., 7 Iowa (7 Clarke), 186.

State *vs.* Bailey, Ibid, 390.

State *vs.* Archibald, 43 Minn., 328; 45 N. W. Rep., 606.

State *ex rel* Wear *vs.* Francis, 95 Mo., 44; 8 S. W., Rep. 1.

People *vs.* Colling, 19 Wend., 56.

Is the Failure of the Return to Deny a Material Allegation an Admission of It?

On this point the authorities are equally numerous and clear, the decisions being practically all one way. As has been stated, the opinion of the trial justice was that the failure of the answer to deny the allegation that the Town of Las Vegas was the county seat of San Miguel County was in effect and for the purposes of this motion, if not for all purposes, an admission that it was the county seat.

There are an abundance of authorities which sustain that proposition and which are here submitted without comment.

All allegations of fact contained in a writ of *mandamus* which are not controverted by the answer are to be taken as true. Pitzer *vs.* Territory, 4 Okla., 86; 44 Pac. Rep., 216; State *vs.* Lean, 9 Wis., 279.

The alternative writ of *mandamus* stands for the declaration and the return for the plea. Every intendment will be made against a return which fails to answer important facts. People *vs.* Ohio Grove Tp., 51 Ill., 191.

Upon a proceeding by *mandamus* to compel the approval of an official bond, the answer alleged that at the time relator presented his bond for approval he furnished no evidence to defendant of his election to the office, nor any evidence of his identity. Held, that is not equivalent to averring that he was not personally known to defendant and that defendant did not know that he had been duly and legally elected to the office; and the answer was insufficient. Copeland *vs.* State, 126 Ind., 51; 25 N. E. Rep., 866.

A return denying "any knowledge or information sufficient to form a belief" in respect to certain material allegations of the petition is insufficient; the provisions of the practice act permitting such answer in ordinary civil cases not being applicable to proceedings by *mandamus*. State *ex rel* Conrad *vs.* Williams, 96 Mo. 13; 8 S. W. Rep., 771.

A denial on information and belief in a return to an alternative writ of *mandamus* is not sufficient; but such denial should be direct and positive; and

so too the averment of matters in avoidance should be direct and positive. State *ex rel* Hudson *vs.* Trammel, 106 Mo., 510; 17 S. W. Rep., 502.

On an application for *mandamus* against a municipal corporation to compel payment of a claim which has been duly certified, verified, audited, and allowed, and the correctness and justice of the items of which are positively sworn to by the relator, a general allegation on information and belief that the bill is grossly extravagant is not sufficient to justify the Court in refusing a *mandamus*. People *vs.* Norton, 12 Abbott's Practice, (N. S.) 47.

And so it has been held that where a transfer agent of a foreign corporation was under the duty of exhibiting the stock book to stockholders, a denial by the agent of any information sufficient to enable him to determine whether the relator was a stockholder did not put in issue the positive allegations of the affidavit on which the application was made (People *vs.* Paton, 20 Abb. N. C., 195); and, again, that where the defendant's affidavit merely alleges ignorance of the facts positively alleged in the petition, that does not put in issue the allegations of the petition (People *vs.* Fulton Co., 53 Hun., N. Y., 254; 6 N. Y., Sup. 591); and, again, it is declared by the New York Supreme Court that denials and affirmations in returns to petitions for the issuance of a writ must be specific and positive, and not merely general conclusions based on information and belief. *In re* Freel, Sup. 38 N. Y., Sup. 143.)

The reasoning upon which these uniform decisions depend would seem to be that where the law imposes a

duty upon a public official he can not evade that duty by declaring that some private individual has not pointed out the way. Where the duty is imposed by the law there is no burden upon a private citizen to see that the law is enforced, nor is there any burden of proof resting upon a private citizen to convince the official that the law demands of him certain things. To the contrary, it is incumbent upon the official himself to ascertain the facts which will determine whether there is a duty devolved upon him by the law.

It was the duty of the Postmaster General in this case to ascertain whether the Town of Las Vegas was and is the county seat of San Miguel County. He had no right to require any individual to prove that fact, or to withhold action until some individual did prove it. His duty was to ascertain from any authoritative source whether the Town of Las Vegas was the county seat of the county; and he can not hide behind the fact (if it is a fact) that two towns are claiming the distinction of being the county seat.

Whatever the reasoning upon which these decisions are based, it remains that they are uniform, and that in all actions of *mandamus* where the relator has under oath alleged material facts, their effect would not be overcome and the claimant would not be put to proof of his allegations upon a mere statement that the defendant does not know whether the allegations are true, or replies that his information and belief is that they are not true. There must be a specific denial.

Is Mandamus the Proper Remedy?

We have called attention in the statement of the case to the law which the relators claim has been violated by the Postmaster General, and have shown that under the law all post offices in county seats throughout the United States which had been *therefore* abolished must be re-established; and that from the date of the passage of the act no other post offices in county seats should be abolished.

The defendant offers in reply a specious and pleasant, but not ingenious sophism, that inasmuch as this post office was not abolished prior to the passage of the act, but since its passage, it is not to be re-established under that law, even admitting that its abolishment after the passage of the act (as he must admit) is in direct violation of the law. And he says that the act being done, it is a finality though the law was violated, and that he can not be compelled by the writ of *mandamus* to undo that which is already done. This idea found lodgement in the mind of the trial justice, and it was upon this mistaken theory that the motion for the writ of peremptory *mandamus* was denied.

Prior to the passage of the act approved June 9, 1896, being the act hereinbefore cited, the legislation defining the duties of the Postmaster General in the matter of establishing post offices and delivering mails at county seats was embodied in the act of June 8, 1872 (17 Stat. L., 283), in these words:

> Sec. 31. That the Postmaster General shall establish post offices at all such places on post roads

established by law as he may deem expedient, and he shall promptly certify such establishment to the auditor for the Post Office Department.

Sec. 216. That the Postmaster General shall cause a mail to be carried from the nearest post office on any established post road to the courthouse of any county in the United States which is without mail.

Let it be observed that at the time of the passage of the act of 1872 no provision had been made for branch post offices.

Under this act of 1872 the discretion given to the Postmaster General in the matter of establishing post offices was very wide, the only limitation being that such post offices as he decided ought to be established should be established upon post roads. The provision for the delivery of mails at county seats did not require that he establish post offices at those county seats, but that he should in some way deliver the mails at county seats. This was the existing law at the time of the passage of the act of June 9, 1896.

It is recognized as a settled principle that all new legislation has for its purpose to change or modify existing law, and it is the duty of the courts to give to new legislation such effect if it is posssble from its wording. Unless the act of 1896 was intended to limit the discretion and to curtail the power of the Postmaster General in the matter of the establishment and maintenance or abolishment of post offices, there was no necessity for the enactment of the law; and we consider the act from that point of view. This act contains two direct and

positive commands, which read together seem sufficient to effect the single purpose of securing the establishment and maintenance of a post office at every county seat in the United States. The first is that no post office established at any county seat shall be abolished or discontinued by reason of any consolidation of post offices made by the Postmaster-General under existing law. The second is that any post office at a county seat heretofore consolidated with some other office be re-established as a separate office at such county seat. Two further significant provisions follow, to which reference will be later made.

The learned trial judge seems to have considered these two commands, the one not to abolish and the other to re-establish as separate and disconnected from each other, and has, we think, for that reason given undue weight and an improper construction to the words "heretofore consolidated" in the command to re-establish. We believe that they should not be read separately, but that each should be construed in the light of the other, and when so construed we believe that the intent and purpose of the legislation is clearly to insure the establishment and maintenance of an independent post office at every county seat in the United States. If this be the true construction, there can be no question that the statute devolves upon the Postmaster General the clear, definite, explicit, peremptory and mandatory duty of maintaining a separate post office in the Town of Las Vegas, and that for failure to perform that affirmative duty the writ of *mandamus* is the only remedy which may be invoked.

Under the previous legislation there was no limit upon the discretion of the Postmaster General in such matters. He might have abolished the post office in the City of New York, though of course it is not likely that any such revolutionary action would have been taken; but under this act of 1896, even if the Postmaster General had discretion, for instance, to suspending a post office in the event of a prevalent epidemic, which action might be justified as an exercise of police power, yet he is expressly prohibited from discontinuing, and is expressly commanded to maintain offices in cases where his only reason for failure to do so is a matter of economy or convenience to the postal service. The Postmaster General can not be above the law; nor are his ideas of economy or convenience a justification for a clear violation of a law, which is not susceptible of but one interpretation. In this case the return says that this is the only reason for his action in failing to maintain the office at Las Vegas. To give the act any other construction than that it imposes upon the Postmaster General an affirmative mandatory duty, would be to declare it a nullity. If the two commands, the one to continue those offices then in existence, the other to re-estbalish those theretofore abolished, are severable, the Postmaster General could obey the second, for the disobedience of which it is conceded *mandamus* would lie, and disobey the first for the disobedience of which it is somewhat seriously contended there is no remedy, and thus the action of Congress would be made a vain and idle one, ineffective to change the then existing law. Unless the act is man-

datory, the Postmaster General may disregard it so far as the continuance of offices already in existence is concerned, and might have obeyed it so far as it related to the re-establishment of offices already discontinued. Yet the next day after their re-establishment, he might abolish them in like manner as he has abolished the post office in the Town of Las Vegas in existence at the time of the passage of the act. Thus the act would have had no binding force upon the Postmaster General whatever.

The provision that Cambridge and Towson should not be affected by this statute seems to us to be significant. That provision would have been entirely unnecessary, if the purpose of Congress was not as we have insisted. For under the construction of the act by the Court below, even without the proviso regarding these two towns, the Postmaster General could have disconnected them from the main offices at Boston and Baltimore, respectively, establish separate offices, the next day abolished them, and reconsolidated them with the Boston and Baltimore offices. It is not possible to believe that Congress was engaged in legislation of this character. It is not reasonable to read the statute as contemplating such a contingency. It is not permissible to suggest that Congress by any possibility contemplated the violation of its peremptory and unconditional command. Reading the whole statute in the light of the then existing law, it seems clear that the act was believed by Congress to cover the entire ground and to secure a post office at each county seat. The first command that the Postmaster General should continue in existence all offices then in

existence in county seats, the second that he should re-establish all offices in county seats previously discontinued, was sufficient to effectuate this purpose, unless Congress anticipated a direct and willful disobedience of the law, which, as we have said, is not for a moment to be thought of. It has never been the custom that legislation should be so carefully and adroitly drawn that an executive officer of the Government may not willfully disobey its mandates. The use of the words "heretofore consolidated" made the second command a complement of the first, and made the statute complete to accomplish the purpose of giving to every county seat a post office. The failure to use the word "heretofore" would have have indicated that Congress anticipated a disobedience of the first command. It is, therefore, insisted that the whole act is mandatory and that its provisions are such as that the Court can and should enforce them by the writ of *mandamus*.

Again, it is impossible to give to this statute a construction which would relieve the Postmaster General from the *duty of maintaining* a post office in every county seat. When he was directed not to abolish post offices in county seats, that direction by necessary implication required him also to *maintain* them where previously established, and to establish and maintain them where previously there were none. For it follows as the night the day, that if he could not abolish a post office in a county seat he *must maintain one there.* A direction not to do a thing is the equivalent of a direction to do the opposite thing. A direction to do a thing is the equiva-

lent of a direction not to do its opposite. Upon this point the trial justice in his opinion cites some authorities (record page 15), and concludes that—

> The act of supplying the people of Las Vegas with proper mail facilitles is an executive act and the duty is one which is imposed by the general law upon the Postmaster General; and in such a case where he has exercised his judgment the court will be slow to review his decision, even if there was authority to do so; but in this proceeding if the Postmaster General has any authority or discretion in reference to the subject matter of the statute and has acted in the premises, whether his decision and acts are right or wrong can not be determined by this court, for the writ of *mandamus* can not be used to review the judgment of an executive officer who has authority to exercise his judgment about the matter complained of. (Record, page 15.)

In this statement we respectfully submit the trial judge made one error of commission and another of omission. He characterizes the action of the Postmaster General as an exercise of judgment, and obtaining that result, announces the familiar principle that courts will not review an act of an executive officer who had the right to exercise judgment.

The error of omission was the failure of the trial judge to have in mind the point just suggested, that being under obligation not to abolish the post office, the Postmaster General was certainly under obligation to maintain it.

As to the question whether it was an exercise of judgment, there ought to be no serious argument; for if

there ever was a case in which a duty imposed upon an executive officer involved absolutely no discretion and no exercise of judgment, it is to be found in this statute, which directs him in plain, unequivocal words both not to do, and to do; that is to say, not to abolish, and, therefore, to maintain. There was no question submitted to him whether he should abolish, and none whether he should maintain. Absolutely nothing was left to his discretion. No two things were given him between which he was to decide. He had no choice. There was nothing regarding which he was to exercise his judgment. He was to do as the law directed.

As to the second proposition, that the duty not to abolish necessarily included the duty to maintain, there can be no controversy. Therefore, being commanded not to abolish this office in the Town of Las Vegas, it was the duty of the Postmaster General to maintain it, on the day he abolished it, and on the next day, and on every day since then, and on the day of this hearing, and it will be his duty to-morrow, next month, next year, and one hundred years from now, or as long as this statute stands unrepealed. We do not doubt that for every day the Town of Las Vegas is without a post office, a citizen of that town could maintain an action against the Postmaster General exactly like this one. If to secure this result *mandamus* be not the proper remedy, what power of a court may be invoked?

The cases cited in the opinion of the Court below in support of its conclusion, are all cases where *negative* action was sought to be enforced, or rather where it was

sought to undo something which had been finally done, as in the case of *ex parte* Nash (15 Q. B., 95), where the relief sought was that a railway company should remove its seal from the register of shareholders. We do not contend that the writ has ever been used to secure that sort of action, and we are not presenting such a case; but in this case it is affirmative action by the Postmaster General that we seek to secure; that is, that he perform the affirmative duty placed upon him by the statute and re-establish *and maintain* a post office at this county seat. The Postmaster General rests, as we have stated, under the continuing duty of maintaining the post office in the Town of Las Vegas; a duty which is devolved upon him by an express mandatory law, and one of which there is a violation by him on every day the Town of Las Vegas is without a post office.

While it can have no possible effect in the determination of the legal questions involved in this case, it is fair to the Postmaster General, who abolished and consolidated this post office with that of the post office in the City of Las Vegas, to say that the similarity in the names of the two towns caused much inconvenience in the delivery of mail, due, however, not to the citizens of the Town of Las Vegas. It may be stated as a matter of fact, having no bearing whatever upon the questions involved, that the City of Las Vegas has never claimed to be or seriously sought to be declared the county seat of San Miguel County; but each of the towns was claim-

ing the name "Las Vegas"—the name by which the old town, the present Town of Las Vegas, has been known for perhaps a century. For that reason many of the citizens of East Las Vegas printed upon their letter-heads and bill-heads and envelopes their address as "Las Vegas, New Mexico." Of course mail so addressed instead of being delivered at the East Las Vegas post office was delivered at the Las Vegas post office, a mile or more away. This resulted in confusion which caused the order of abolishment, but which, of course, did not justify the act, it being in violation of the positive command of the law.

It is also but fair to the relators to say that there is not a theoretical, but a practical and irremediable loss and inconvenience arising out of the failure to maintain their post office. Some of them have to go as far as two miles to secure their mail and buy stamps, to register letters, to purchased money orders, and to avail themselves of the various conveniences of the postal service, while the absence of these mail facilities render residence in the town less desirable and depreciate the value of real estate there. Other undesirable consequences flowing from this unlawful act of the Postmaster General are not necessary to be cited. The City of Las Vegas has a population of nearly five thousand. The Town of Las Vegas, its inhabitants being largely Mexicans, numbers about four thousand people, and its streets are neither numbered nor named, so that the free delivery system will be of but little benefit to them. However that may be, whatever may be the inconvenience or the loss to these

people, the law says that the Town of Las Vegas shall have a post office. If the Postmaster General desires to avoid the inconveniences and at the same time to obey the law enacted for his direction, he may abolish the post office in the City of Las Vegas and consolidate it with that in the Town of Las Vegas.

In conclusion we quote from the opinion of the trial justice a paragraph which meets with our hearty approval, but which seems strangely out of company with the ultimate conclusion of the court. It is in these words:

> It has been frequently held in our country that no man is above the law, no matter how high he may be in official position, and if he violates the law, there should be some remedy which the people can have to protect them in their right to have the law executed, and I must conclude that if this case is one to call for its exercise, this court has the power to direct action on the part of the defendant.

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Of Counsel.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, A. D. 1905.

No. 1559.

No. 7, Special Calendar.

THE UNITED STATES ON RELATION OF MARGARITO ROMERO, MAYOR; JESUS M. TAFOYA, RECORDER, AND IGNACIO ESQUIBEL, *et al.*, APPELLANTS.

vs.

GEORGE B. CORTELYOU, POSTMASTER-GENERAL.

BRIEF FOR APPELLEE.

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vs.

GEORGE B. CORTELYOU, POSTMASTER-GENERAL.

Brief for Appellee.

Statement.

This appeal is from an order of the Supreme Court of this District, refusing a motion for the writ of *mandamus* to compel the Postmaster-General to re-establish the post-office at the town of Las Vegas, New Mexico. The petition was filed July 14, 1904, by the mayor and other officers of the town, claiming to act on behalf of and by authority of the town, and with them were joined two

citizens and taxpayers of the town. All of the petitioners are citizens of the United States. (Rec., p. 2.)

Petitioners allege that the town of Las Vegas is and for many years has been the seat of San Miguel County; that for many years before March 31, 1903, there was a postoffice at said town, but that on that day said postoffice was, by the then Postmaster-General, the late Henry C. Payne, "abolished and discontinued and consolidated with the postoffice in the town of East Las Vegas, New Mexico, now called the City of Las Vegas." (Rec., p. 23.)

Petitioners then allege that the abolishment of the postoffice was in direct violation of the act of Congress of June 9, 1896 (29 Stats., 313); that they and the other inhabitants of the town of Las Vegas are entitled to have a postoffice established and maintained in the town for their convenience and necessities, and that without such postoffice they will be put to great inconvenience, and occasioned great and irreparable damage. They, therefore, pray that the court will compel the Postmaster-General to re-establish the postoffice.

The act of Congress upon which petitioners rely is as follows:

> "That no postoffice established at any county seat shall be abolished or discontinued *by reason of any consolidation of postoffices* made by the Postmaster-General under existing law, and any such postoffice at a county seat, heretofore consolidated, shall be established as a separate postoffice at such county seat: *Provided*, however, that this provision shall not apply to the city of Cambridge, Massachusetts, or to Towson, Maryland." (29 Stat., 313.)

From the answer of Postmaster-General Payne it appears that the town of Las Vegas and the city of Las Vegas are adjoining communities in San Miguel

County; that prior to March, 1903, the postoffice at the town was called Las Vegas, while that at the city was called East Vegas; that the city, by reason of its greater population, was entitled by law to free delivery of mail matter, while the town was not; that many thousands of pieces of mail intended for the city were annually sent by mistake to the town, and after much delay and at great expense to the United States and inconvenience to the public were sent to the proper postoffice and thence distributed; that the Postmaster General in the exercise of his official duties decided that the efficiency of the postal service required the discontinuance of the postoffice at the town of Las Vegas, and that accordingly, on March 31, 1903, he discontinued that postoffice, changed the name of the postoffice at the City of Las Vegas, and extended the free delivery of that postoffice to cover the territory formerly served by the postoffice of the town; and that since that date he had declined to re-establish the discontinued postoffice, because in his opinion such re-establishment was not expedient. And he avers that his action is not subject to the review by the Court. (Rec., p. 7.)

The answer further alleges that because of the action so taken by the Postmaster-General the inhabitants of the town of Las Vegas now have greater mail facilities and conveniences than they did or could have from a separate postoffice; that the Postmaster-General had several times offered to establish a branch postoffice at the town under Section 3871, R. S. U. S., but that the inhabitants had refused and protested against the establishment of a branch office. The offer to establish a branch postoffice is renewed in the answer. (Rec., pp. 6, 7.)

As to the allegation of the petition that the town of Las Vegas was a county seat, the Postmaster-General answers that he has no knowledge, but that he is in-

formed that the town and city each claims to be the county seat; he, therefore, demands strict proof of the allegation if it should be deemed material. (Rec., p. 6.)

The answer raises several other questions, namely, that the petitioners are without sufficient interest to entitle them to sue; that they are not injured; and that the petitioners are guilty of laches. (Rec., p. 7.)

Before further action was taken in the case, Mr. Payne died; the action was revived against his successor in office, Mr. Wynne, who appeared and adopted Mr. Payne's answer. (Rec., pp. 8–10.)

The petitioners thereupon moved the Court to issue the writ of peremptory *mandamus*, on the ground that the answer had admitted the material allegations of the petition. (Rec., p. 10.)

Upon the retirement of Mr. Wynne from office the cause was revived against the present defendant, Mr Cortelyou, who appeared and adopted Mr. Payne's answer. (Rec., pp. 16, 17.)

The Court denied the motion for the writ and dismissed the petition. (Rec., p. 18.) The opinion of the Court appears on pages 11 to 16 of the Record.

Argument.

I.

The discontinuance of the postoffice at the town of Las Vegas, and the refusal to re-establish it, were acts within the official discretion of Postmaster-General Payne, for which he could not be called to account.

The following are the material parts of the sections of the Revised Statutes governing the case:

> Sec. 388. "There shall be at the seat of Government an executive department to be known as the

> Postoffice Department and a Postmaster-General who shall be the head thereof."
>
> Sec. 396. "It shall be the duty of the Postmaster-General, 1st. To establish and discontinue postoffices.
>
> * * * * * * *
>
> 9th. To superintend generally the business of the department and execute all laws relative to the postal service."
>
> Sec. 3829. The Postmaster-General shall establish postoffices at all such places on post roads established by law as he may deem expedient."

This section is taken from section 31 of the act of June 8, 1872, quoted on page 12 of appellants' brief. Section 216 of the same act, providing for the delivery of mail at county seats where there is no postoffice, also quoted by appellants, does not seem to be carried forward in the revision.

That both the town and city of Las Vegas are on post roads, is not questioned.

> Sec. 3864. "The Postmaster-General may discontinue any postoffice where the safety and security of the postal service and revenues are endanged from any cause whatever, *or where the efficiency of the service requires such discontinuance.*"

It is clear from this examination of the statutes that the Postmaster-General has the right not only to establish postoffices, but to discontinue them where the efficiency of the service so requires. Of course, the Postmaster-General is the judge, and the only judge under the statutes of when a discontinuance is required by the efficiency of the service.

It is averred in the answer in this cause, and admitted by the motion for the writ, which operates as a demurrer, that Postmaster-General Payne, in the exercise of his

official duties, decided that the efficiency of the postal service required a discontinuance of the office at the town of Las Vegas, and therefore discontinued it.

Even before the passage of the act from which section 3864 was taken, the Supreme Court held in Ware *vs.* United States, 4 Wall., 617, 632, that the Postmaster-General necessarily had the power to discontinue post-offices.

The question, then, of the discontinuance of the post-office, being one which by law is cast upon the Postmaster-General, and that official having decided the question, the court can not interfere. (U. S. *ex rel.* Riverside Oil Co. *vs.* Hitchcock, 190 U. S., 316.)

Petitioners apparently admit the truth of this statement as a general proposition, but argue that the discontinuance in this case was in violation of the act of June 6, 1896, already quoted, the substance of which is as follows:

> "That no postoffice established at any county seat shall be abolished or discontinued *by reason of any consolidation of postoffices,* * * * and any such postoffice at a county seat *heretofore consolidated* shall be established as a separate postoffice at such county seat."

Admitting *arguendo* that the town of Las Vegas is the county seat, yet it is not alleged in the petition that the postoffice was abolished by reason of any consolidation of offices. The petitioners, therefore, having failed to bring themselves within the terms of the statute, are not entitled to the writ.

> Shortt Extraordinary Remedies, 227, 229.
> Merrill on Mandamus, sec. 56.

Furthermore, it expressly appears in the answer that

the discontinuance of the postoffice was due to the decision of the Postmaster-General that such discontinuance was required by the efficiency of the postal service; and this is admitted by the petitioners in their motion for the writ.

Even if it did appear in this case that the postoffice was discontinued in direct violation of the Act of June 9, 1896, by reason of the consolidation of offices, that act does not direct its re-establishment.

That act provides that postoffices at county seats theretofore consolidated shall be re-established, but the office at the town of Las Vegas was discontinued many years after the passage of that act. Under the language of that statute, then the only wrongful act, if any, committed by the Postmaster-General was the discontinuance of the postoffice, and not the refusal to re-establish it.

The petitioners have mistaken their remedy. It is possible that a bill to restrain the discontinuance of the postoffice or to compel its re-establishment by mandatory injunction would be proper, but it is well settled that the writ of *mandamus* does not lie and can not be used to undo an act which has already been committed.

Merrill on Mandamus, Sec. 42;
Shortt Extra. Rem., pp. 227, 250;
19 Enc. Law, 743;
Hays *v.* Morgan, 81 Ill. App., 665;
Bryant *v.* Righter, 36 La. Ann., 112;
People *v.* Thompson, 32 Hun 93;
Sweet *v.* Conley, 20 R. I., 381;
Maxwell *v.* Burton, 2 Utah, 595;
White *v.* Marshall, 2 Baxter (Tenn.), 122;
People *v.* Judge, 1 Mich., 359.

II.

Postmaster-General Payne having discontinued the postoffice in question and Postmaster-General Wynne

having refused to re-establish it, reconsideration of their actions by the present Postmaster-General will necessarily involve the exercise of judgment.

In Decatur *vs.* Paulding, 14 Peters, 513, 515, Mrs. Decatur had claimed a pension under both a private resolution and a general law; the Attorney-General being of opinion that she was entitled to only one pension, the Secretary of the Navy offered to pay either pension, and she took under the law. Upon Mr. Paulding succeeding to the office, Mrs. Decatur requested him to revise the decision of his predecessor, but this he declined to do. The Supreme Court, in refusing the writ of *mandamus* to compel such a revision, held that the determination of the Secretary whether he would revise the decision of his predecessor involved judgment and discretion on his part. The decision disposes of the present case.

In the case of the United States *vs.* Key, 3rd MacAr., 328, 337, the Supreme Court of this District refused a *mandamus* to compel the re-adjustment of a postmaster's salary which had been fixed by the preceding Postmaster-General.

III.

It is not admitted in the pleadings that the town of Las Vegas is the county seat.

The petition alleges that the town is the seat of San Miguel County, but Postmaster-General Payne in his answer says that he is informed that the town and the City of Las Vegas each claims to be the county seat, and he calls for strict proof of the allegation. (Rec., p. 6.) The allegation is essential to the petitioners' case. They contend, however, that it is admitted and invoke the familiar rule of common law pleading that an allegation

of fact not denied or confessed and avoided by the adversary is deemed to be admitted.

There are two reasons why this rule does not apply. In the first place, the return to a writ of *mandamus* originally was conclusive on the petitioner, and it was only fair that the defendant should not be allowed by pleading a matter on information and belief to deprive the petitioner of his *mandamus*, and then to defeat an action for false return by proving that he actually believed the facts which he alleged. At the present time any fact in a return may be denied and an issue of fact raised and tried in the *mandamus* suit.

Again, at common law the return was not usually required to be sworn to. Tapping on Mandamus, p. 364; Merrill on Mandamus, Sec. 283. There was, therefore, no reason why the rule of common law pleading should not apply. But under our Code the answer to the petition must be verified. We think it is clear, then, that the rule of equity pleading permitting the defendant to deny on information and belief, or where he is not in a position to form a belief to call for strict proof, is now applicable to answers in *mandamus* proceedings.

The present case well illustrates the evil results of any other rule. Postmaster-General Payne discontinued the office in question, because he thought such action was required by the efficiency of the service; it was sought to compel him to reverse his action on the ground that the town was a county seat. This was a new matter to the Postmaster-General; he investigated it and found that there was a *bona fide* dispute between the town and the city, each claiming to be the county seat.

While counsel for appellant state in their brief that it was the Postmaster-General's duty to ascertain whether the town was a county seat, yet we do not believe that they admit for a moment that it was for him to settle

this dispute, and that his determination, whether right or wrong, would be binding on the town. Not being compelled, therefore, to determine this question, and finding it unnecessary to even form an opinion on the subject on the view he took of the case, the Postmaster-General undoubtedly was not required to allege under oath that the town was not the county seat.

The issue was clearly raised by his call for proof of the town's allegation.

Counsel cite a number of cases in support of their contention on this point.

None of these cases is recent; in some of them the rule is laid down generally and the application to the particular case is not apparent; in others the rule is based on statutes; and it is confidently believed that in none of them was the return required to be under oath.

The following cases support our contention:

In People *vs.* Ryan, 17 Mich., 159, the petition was filed by a certain school district to compel a levy of taxes; the supervisor returned that he was ignorant whether the school district was duly organized, and that he could neither admit nor deny the allegation of the petition to that effect. The Court held the return sufficient to raise an issue saying, "a party can not be compelled under oath to admit or deny what he has no means of knowing with certainty."

This case was followed in Brownell *vs.* Supervisors, 49 Mich., 414, in which petitioner, claiming to own certain ditch certificates, asked for the writ to compel the supervisors to provide for their payment; the supervisors answered that they had no knowledge whether petitioner was such owner, and petitioner was required on this allegation to prove his title.

People *vs.* Ryan is also quoted with approval in Creagher *vs.* Hooper, 83 Md., 490, 502.

In State *vs.* Cooley, 59 Minn., 514, 518, the Court held that denials on information and belief in a return to a writ of *mandamus* were sufficient.

> "The principal reason for the common law rule that the denials or affirmations in a return on *mandamus* must be positive, and not on information and belief, was that the return was conclusive, and could not be traversed. But under our statute the reason no longer exists. * * * A conscientious and honest man or public official should not be deprived of his substantial rights because he feels that he can only truthfully allege the existence of certain facts, substantiating those rights upon information and belief. * * * He should be permitted to allege such facts upon information and belief and not be driven out of court because he would not utter a falsehood or commit perjury."

Such a denial was held sufficient in—

> People *v.* Alameda, 45 Cal., 395, and
> Buffalo, Etc., R. Co. *v.* Com., 120 Pa. St., 537, 550.

And in McGuire *vs.* Bricklayers' Union, 46 N. Y. Supp., 648, and State *vs.* Sherwood, 15 Minn., 221, it was held that an issue of fact was raised when the answer denied knowledge or information sufficient to form a belief as to certain averments of the petition.

IV.

None of the Petitioners has Sufficient Interest in the Subject-Matter of the Suit to Entitle it or Him to be Heard.

(a) The town of Las Vegas has no special interest in the maintenance of the postoffice and is not entitled to sue.

This is settled by the case of Georgetown *vs.* Canal Co. 12 Peters, 93, 99, in which a bill filed by the city of Georgetown to restrain the Canal Company from constructing an aqueduct across the Potomac River was dismissed.

In Parkersburg *vs.* Merriam, No. 44,504 at law, in the Supreme Court of this District, the late Justice Cole for this reason dismissed a petition of the city of Parkersburg to compel the Director of the Census to retake the census of that city.

(b) Nor can the citizens of Las Vegas sue without showing special damage, and this they have failed to do.

The rule is laid down by Chief Justice Shaw in the matter of Wellington, 16 Pick., 85, 105, as follows:

> "Undoubtedly the general rule is that a private individual can apply for a writ of *mandamus* only in a case where he has some private or particular interest to be subserved, or some particular right to be pursued or to be protected by the aid of this process independent of that which he has in common with the public at large; and it is for the public officers exclusively to apply where public rights are to be subserved."

This language is quoted and approved in Sawyer *vs.* Commissioners, 25 Maine, 291, 296, in which the court refused on the application of a citizen to compel the laying out of a road.

In Mitchell *vs.* Boardman, 79 Maine, 469, the application of a citizen to compel the police court judge to issue a search warrant was refused.

In Smith *vs.* Saginaw, 81 Mich., 123, 127, the court denied the application of a resident taxpayer to compel the common council of the city of Saginaw to rescind a certain resolution.

In Welsh *vs.* Supervisors, 23 Iowa, 199, 203, the stat-

ute provided that all laws should be published in a newspaper in each county. The court refused the application of the owner of a newspaper to compel the publication of the laws, upon the ground that the applicant had no special interest in the execution of the law.

So, in the case at bar, while the petitioners have alleged generally that they suffer great inconvenience, they have failed to show that any one of them uses the United States mails, or that their injury is greater than that suffered by the whole community.

As well might the court permit a United States citizen, residing on the Island of Guam, to be heard in this case, as to sustain this petition.

V.

The Petitioners are Not Injured.

The petitioners do allege generally in paragraph 8 that they are irreparably injured. The defendant Payne denies this allegation, and alleges as matter of fact that petitioners now have greater mail facilities and conveniences than they did or could have with a separate postoffice.

By their motion for the peremptory writ, which operates as a demurrer (Merrill on Mandamus, sec. 285), petitioners admit this.

It clearly appears, therefore, that the right which the petitioners are seeking to enforce is not a substantial right of person or of property, and is not one which the courts will protect by the extraordinary remedy of *mandamus*.

Merrill on Mandamus, Sec. 49;
Brown *v.* Root, 18 App., Cases D. C., 342;
Edwards *v.* Root, 22 Ib., 419.

Again the Postmaster-General has substantially complied with the law as construed by petitioners. The petitioners are now not only receiving greater mail facilities than they could receive if their prayers should be granted, but the Postmaster-General has offered to establish at the town of Las Vegas a branch office which will give the inhabitants all the advantages of a separate postoffice and not deprive them of the free delivery of their mail.

This offer being made on the record the writ will not issue. Merrill on Mandamus, Sec. 67, p. 78.

It is respectfully submitted that the action of Postmaster-General Payne in discontinuing the postoffice at the town of Las Vegas, was within his executive discretion and can not be reviewed by writ of *mandamus;* and that, if there could possibly be any doubt in the matter, this court will not undertake to disturb the discretion of the lower court in refusing the writ in this case; but, taking into consideration the laches of the petitioners in applying for relief, and the fact that they suffer no injury, it will not interfere with the Postmaster-General by compelling him to establish and maintain a postoffice at the town of Las Vegas and thus deprive the inhabitants of that town who have not been heard in this case of the mail facilities which they now enjoy.

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